No. 11878

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JENNIE WUCHNER,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the ESTATE OF CHARLES E. HILL, Doing Business as HILL MACHINE TOOLS,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

On April 1, 1946 an Involuntary Petition in Bankruptcy was filed against Charles E. Hill, doing business as Hill Machine Tools, in the United States District Court, Southern District of California, Central Division, alleging that said Hill could become a bankrupt under Section IV of the Bankruptcy Act. [Tr. 2-3-4.] The proceeding was referred to Benno M. Brink, Referee in Bankruptcy, on April 5, 1946 [Tr. 7], and on the first day of May, 1946, said Charles E. Hill was adjudicated a bankrupt. [Tr. 8.]

On June 26, 1946, George T. Goggin, the duly elected Trustee in Bankruptcy of said Hill, filed an Amended Petition to Show Cause *re* Jennie Wuchner [Tr. 15-16],

and on July 3, 1946, Benno M. Brink, Referee, entered an order directing Jennie Wuchner to appear and show cause why prayer of Amended Petition of Trustee should not be granted. [Tr. 21.] Jennie Wuchner appeared and filed answer to Trustee's petition, setting up as an affirmative defense the lack of jurisdiction of the Referee to proceed in the matter. [Tr. 22-23-24.] After a trial, the Referee entered its Findings of Fact and Conclusions of Law and Order [Tr. 34-45, incl.] granting prayer of Trustee's petition. On January 8, 1947, Jennie Wuchner filed her Petition for Review of Referee's Order by Judge. [Tr. 46-61, incl.] After hearing, and on December 16, 1947, Honorable Jacob Weinberger entered his order denying Petition for Review [Tr. 62] from which this appeal is taken. On December 16, 1947, Jennie Wuchner filed her Notice of Appeal and bond for cost. [Tr. 63.]

This Honorable Court has jurisdiction to review the Order of Judge Weinberger under provisions of U. S. C. A., Title 28, Section 228, Subsection A.

Statement of the Case.

On June 15, 1945, Jennie Wuchner, appellant, entered into a real estate contract [Tr. 96-99 incl.] with bankrupt Charles E. Hill covering sale to Hill of an improved business property in Redondo Beach, California. The price was $5,500.00, payable in monthly installments of $200.00 each until $1,500 and interest was paid, whereupon Jennie Wuchner, appellant, agreed to deed the property to Hill and take back a note secured by trust deed for the balance.

The contract provides that the making of the payments and the performance of other covenants on the part of

Hill is a condition precedent to performance on the part of vendor, Jennie Wuchner, appellant herein. Time is made the essence of the contract. Attached to the contract is a loose rider, signed by the parties, as follows: "It is further agreed that any default shall not become effective for thirty (30) days from the date of said default." [Tr. 100.]

Bankrupt Hill made only two of the monthly payments and on February 5, 1946 was in default for payments due October 1, 1945, November 1, 1945, December 1, 1945, January 1, 1946 and February 1, 1946. In addition, Hill failed to pay taxes due on said property. On February 5, 1946, appellant Wuchner notified Hill in writing [Tr. 101] that, there having been default in the payment of installments, the whole amount of the principal and interest was now due and unpaid in the sum of $4,912.63 and demanded payment of the total sum forthwith. This notice was served on Hill in San Quentin Penitentiary, where he was then incarcerated. On February 8, 1946, Jennie Wuchner, appellant, served Hill with a notice that contract had been cancelled by reason of the default by Hill of the payment of the monthly installments. [Tr. 109.]

On February 11, 1946, Angelus Escrow Service Company of Redondo Beach, California sent a letter [Tr. 115-116] to appellant Jennie Wuchner referring to her demand of February 5, 1946, and enclosing in said letter escrow instructions for her to sign and statement of identity for her to sign and stating that there was on deposit with Angelus Escrow Service Company the amount of Jennie Wuchner's demand, "subject to the escrow instructions for clear title as therein set forth." [Tr. 115-123, incl.] This letter did not state that it was written

on behalf of the vendee, Hill, or that the Angelus Escrow Service Company had any right or authority to act for him or on his behalf.

On February 14, 1946, Jennie Wuchner returned to Angelus Escrow Service Company its original letter of February 11, 1946, and the escrow instructions attached thereto [Tr. 115] stating that non-compliance with the terms of the contract by Hill had caused same to be forfeited and cancelled.

Thereafter and on February 20, 1946, Jennie Wuchner filed an action in the Superior Court of Los Angeles County to quiet title and foreclosure of purchaser's rights in said property against Hill. No answer was, or has been, filed in this action. On February 27, 1946, Charles E. Hill and Dora Hill, his wife, filed an action against appellant, Jennie Wuchner, for declaratory relief. Jennie Wuchner filed an answer to this complaint and both actions are still pending in the State Court.

Thereafter and on April 1, 1946, an Involuntary Petition in Bankruptcy was filed against Hill [Tr. 2-5, incl.] and on June 26, 1946, G. T. Goggin, appelleee herein, Trustee in Bankruptcy for said Hill, filed an Amended Petition for Order to Show Cause *re* Jennie Wuchner [Tr. 15-20, incl.] alleging that, on February 11, 1946, Hill did tender the full sum then owing on the contract, to wit, $4,912.63, to Jennie Wuchner, and further alleging that she refused the sum so tendered and attempted to declare a foreclosure of said contract. The petition sets out the pendency of the two actions in the State

Court, but alleges that the issue determining title of the said property should be litigated before the Referee. The Trustee also alleged that, prior to filing the petition, he had tendered to Jennie Wuchner the sum of $5,035.43, which was the amount of her demand of February 5, 1946, plus interest at six per cent up to July 6, 1946.

On July 3, 1946 the Referee issued an order [Tr. 21] directing Jennie Wuchner to appear and show cause why the prayer of Trustee's petition should not be granted. The appellant, Jennie Wuchner, filed her answer [Tr. 22-25] alleging that said contract had been cancelled and that said Hill had no rights thereunder, and denied all other allegations of the petition except the existence of the contract itself. She denied the right of the Referee to try or adjudicate the questions raised in the petition and, as an affirmative defense, alleged that the State Court, having acquired jurisdiction of the *"res"* and the parties, before the adjudication of bankruptcy, retained sole jurisdiction and the Bankruptcy Court had no jurisdiction of the within proceedings.

Over the objections of appellant as to the Referee's jurisdiction, the matter proceeded to trial before Benno M. Brink, Referee, on November 1, 1946. [Tr. 96-160, incl.]

The Trustee called two witnesses, Henry F. Poyet and Dora M. Hill. Poyet testified that Charles E. Hill, the vendee, sent him a copy of Jennie Wuchner's demand of February 5, 1946 from San Quentin Penitentiary and that he received it on February 6 or 7, 1946. He identi-

fied a letter sent by Angelus Escrow Service Company to Jennie Wuchner, appellant, on February 11, 1946 [Tr. 115-116] and testified that he enclosed in said letter, for her signature, escrow instructions and statement of identity. [Tr. 112.] The escrow instructions which were enclosed in the Angelus Escrow Service Company letter of February 11, 1946 and which Jennie Wuchner was required to agree to and sign contained numerous conditions to be performed by Jennie Wuchner before any money was to be paid to her. [Tr. 116 to 123, incl.] Among other conditions, she had to: (1) Sign the escrow agreement; (2) Agree that escrow could remain open until May 6, 1946; (3) Accept the sum of $4,912.63 at some date after May 6, 1946, although said sum included interest on the unpaid principal only up to February 5, 1946; (4) Sign a statement of identity giving her residences and occupations during the past five years and a statement as to any former marriages [Tr. 124-125]; (5) Deposit a grant deed in the escrow, deeding said property to Hill, and (6) Secure and deposit in the escrow a policy of Title Insurance. Poyet, as President of Angelus Escrow Company, testified that the amount of Jennie Wuchner's demand of February 5, 1946 ($4,912.63) was on deposit with the Angelus Escrow Service Company on February 11, 1946 and that the sole condition in connection with the payment of that money was obtaining a certificate of title insurance [Tr. 126], although the letter itself stated that the money was on deposit "subject to the escrow instructions for clear title as therein set forth." [Tr.

116.] On cross-examination, however, in response to a question by the Referee, "Was there in this particular escrow at the time in question the sum of $4,912.63 to the credit of Charles E. Hill and subject to his order and deposition?" He replied, "We did not have it in this particular escrow—no." [Tr. 128-129.] On re-direct examination he testified that the money available for the payment of the tender was the money referred to in Trustee's Exhibit No. 5 [Tr. 136-137], which was a letter to Angelus Escrow Service Company under date of February 11, 1946 signed by Frank Bruno and Teddy Berg, which referred to and made a part of the letter the escrow instructions signed by Charles E. Hill which had to be signed by Jennie Wuchner. This letter stated in part [Tr. 136]:

> "We, the undersigned, hand you the sum of $4,-912.63 *which you are to use when* you can comply with the foregoing instructions of Charles E. Hill * * * and, in addition, you will record for us concurrently with the deed from Mrs. Jennie Wuchner to charles E. Hill a deed from Charles E. Hill and Dora Hill, his wife, to Frank Bruno and Teddy Berg to the above described property. You will have title showing free and clear of encumbrances said property in Frank Bruno and Teddy Berg."

The witness, Dora M. Hill, testified over objection of appellant that she had a conversation with Norman Wuchner, son of appellant, about the middle of October, 1945. [Tr. 153.] She told him she might be late with payments

because she was upset by everything else that had happened, and he told her not to worry, that "we can work something out. I am not interested in having all the money at one time. I want the interest on it over a time for my mother's income." She testified she never talked with Norman Wuchner after the October meeting about the payments.

It was stipulated by counsel that Charles E. Hill, the vendee, was charged with a felony in September, 1945, that he was arrested, held in jail and, on December 24, 1945, sentenced to a long term in San Quentin Penitentiary. [Tr. 156-157.] On such testimony and documentary evidence herein referred to, the Referee filed his Findings of Fact, Conclusions of Law and Order on December 15, 1946 [Tr. 34-45, incl.], holding in favor of the Trustee and ordering Jennie Wuchner, upon payment to her of the sum of $5,035.43 (which was the unpaid principal and interest at six per cent up to only July 6, 1946 [Tr. 18]), to *concurrently* therewith execute a grant deed to George T. Goggin, Trustee, conveying the property in question to him.

Thereafter appellant, Jennie Wuchner, filed a Petition for a Review of the Referee's Order [Tr. 46-61, incl.], and on December 16, 1947 Honorable Jacob Weinberger, Judge of United States District Court of Southern District of California, Central Division, entered his order denying Petition for Review and adopted, as modified, the Findings of Fact and Conclusions of Law and Order of the Referee. [Tr. 62-63.]

Specifications of Errors.

Here, in accordance with Rule 20, we have grouped the errors involved and related them to the Findings of Fact and Conclusions of Law and Orders, and appellant's Appeal Points. [Tr. 161-163, incl.]

As to Waiver:

(1) The Referee and Court erred in holding as a Conclusion of Law that "by not legally insisting upon the making of the regular monthly payments * * * the seller waived the provision as to the time being of the the essence contained in said agreement." [Appeal Points I, II, III, Tr. 162; Conclusions of Law I, Tr. 42.]

(2) The Referee and Court erred in holding that Jennie Wuchner, by exercising her option to accelerate payments, waived her right to terminate the agreement by reason of any default in monthly payments. [Appeal Points III and IV, Tr. 162; Conclusions of Law III, Tr. 43.]

(3) The Referee and Court erred in admitting testimony of Dora M. Hill over the objections of appellant as to conversations she had with Norman Wuchner, insofar as it tended to show Norman Wuchner as an ostensible agent of Jennie Wuchner, or attempted to show Norman Wuchner waived any rights of Jennie Wuchner [Tr. 148-159, incl.], Mr. Bearman, counsel for Jennie Wuchner, made the following objections to the testimony of Dora M. Hill in this connection [Tr. 148]:

> "Mr. Bearman: I object to the question on the grounds that it is incompetent, irrelevant and imma-

terial and it is calling for a conclusion of this witness; and the further ground that it is clearly shown here that the parties to this contract and to this controversy are Jennie Wuchner and Charles E. Hill, and it would be hearsay insofar as whatever Mr. Wuchner did."

And again [Tr. 149]:

"Mr. Bearman: I object to the question on the ground that no foundation has been laid and any testimony offered here by her (Mrs. Dora M. Hill), would not affect the rights of Mrs. Jennie Wuchner. It is hearsay."

And again [Tr. 151]:

"Mr. Bearman: May I record the same objections to all this line of testimony; incompetent, irrelevant, immaterial and not binding upon Mrs. Wuchner, and no foundation laid, Your Honor * * * that is not the proper way to show agency and is purely hearsay."

Again [Tr. 159]: Mr. Bearman: "Now, Your Honor, at this particular time I move to strike all of the answers and all of the testimony that has been offered by this witness concerning Norman Wuchner on the ground that, insofar as Jennie Wuchner, who is the plaintiff in the action I have referred to and is the same person involved in this particular action, that it is in no way binding on her, and there has been no testimony offered showing an agency or any right on the part of Norman Wuchner to bind Mrs. Jennie Wuchner." [Tr. 159-160.]

(4) The Referee and Court erred in denying appellant's motion at the conclusion of the testimony of Dora M. Hill [Tr. 159] to strike all of her testimony regarding

declarations, statements or admissions of Norman Wuchner on the grounds that such testimony was incompetent to prove ostensible agency and was hearsay and not binding upon appellant, Jennie Wuchner. [Tr. 159-160.]

(5) The Referee and Court erred in considering any question of waiver on the part of appellant. Waiver was not pleaded. [Petition for Order to Show Cause, Tr. 15-16; Testimony of Dora M. Hill, Tr. 139-147, incl.; Appeal Points II, III, Tr. 161, 162.]

As to Condition Precedent:

(6) The Referee and Court erred in finding as a fact that "no notices of default nor evidence of demand for payment were proven at the time of hearing of this matter prior to demand of February 5, 1946 [Finding of Fact No. II, Tr. 36-37], and in finding as a fact "that pursuant to the terms of the agreement of sale, being Trustee's Exhibit No. 1, the receipt of these moneys was *contingent* upon the seller providing the buyer with a Certificate of Title Policy showing the property free and clear, and in accordance with the terms of the agreement, the said sum of $4,912.63 was duly offered to Jennie Wuchner, as the seller, at a time when the offer could be performed in accordance wth the terms and conditions thereof" [Finding of Fact IV, Tr. 39]; and in finding as a fact that "the said Jennie Wuchner did again arbitrarily and unequivocally refuse to accept any offer of payment and did so refuse without specifying any defect or irregularity in the offer to pay in full as described hereinabove." [Finding of Fact V, Tr. 39; Appeal Points IV and V.] The Referee and Court completely disregarding the provision of the contract [Tr. 98] that timely payments were a condition precedent.

As to Tender:

(7) The Referee and Court erred in holding as a Conclusion of Law "that the buyer made a proper offer * * * with which offer he could then comply, tendering the sum of $4,912.63 and thereby effectively meeting the demand of the seller as contained in the notice of February 5, 1946; that, contrary to the expressed terms of the agreement of sale and the demand of February 5, the buyer wrongfully failed and refused to accept said offer and the buyer is now entitled to the grant deed to the real property involved and the certificate of title insuring the same pursuant to the terms of said agreement of sale." [Conclusion of Law IV, Tr. 43; Appeal Points IV and V, Tr. 162.]

(8) The Referee and Court erred in holding that Hill made a legal tender of the sum of $4,912.63, and in finding as a fact, "the receipt of these monies was *contingent* upon the seller providing the buyer with Certificate of Title Policy." [Finding of Fact IV, Tr. 39; Appeal Point V, Tr. 163.]

(9) The Referee and Court erred in holding, as a Conclusion of Law, that appellant "did wrongfully notify the buyer that the seller had terminated and cancelled the aforesaid agreement of sale and did repeat this wrongful termination and cancellation by her return of the documents as contained in Trustee's Exhibit No. 4, being her letter of February 14, 1946, to the attorney for Charles E. Hill, that the aforesaid unequivocal indications by the seller that no offer of performance by or on behalf of the buyer would be considered by her rendered it unnecessary for the buyer to thereafter make any further offer of performance." [Conclusion of Law V, Tr. 44: Appeal Point VI, Tr. 162.]

(10) That the Referee and Court erred in holding as a Conclusion of law "that, pursuant to the expressed provisions of said agreement, the buyer had thirty days from the date of the receipt of said notice on February 6, 1946 within which to comply with said demand of seller." [Conclusion of Law II, Tr. 42; Appeal Point IX, Tr. 163.]

As to Jurisdiction:

(11) The Referee and Court erred in holding that the Bankruptcy Court had jurisdiction to try this matter in a summary proceedings as all rights of bankrupt Hill in the property under the contract had been terminated and cancelled prior to his adjudication, and any possession of the *"res"* had by him or his Trustee was illegal and that of trespassers only. [Order of Judge Weinberger, Tr. 62; Appeal Point VIII, Tr. 163.]

As to All Issues:

(12) The Referee and Court erred in their interpretation of the real estate contract and the notices given thereunder, particularly the "condition precedent" and "time is of the essence" clauses. [Conclusions of Law and Order of Referee, Tr. 42-45, incl.; Appeal Point IV, Tr. 162.]

(13) The Referee and Court erred in decreeing specific performance in favor of a Trustee of a defaulting bankrupt. A Court of Equity does not aid one in default. [Order of Referee, Tr. 44-45; Order of Judge Weinberger, Tr. 62-63; Appeal Point IX.]

(14) Attorney Fees. The contract provides that in the event an action be instituted under the contract, the Buyer agrees to pay such attorney fees as fixed by the Court. [Tr. 98.] Attorneys' fees should be allowed by this Court for appellant's attorneys.

Summary of Argument.

This is an equitable action in bankruptcy brought by a Trustee to enforce specific performance of a contract covering the sale of improved real estate. It presents the rather anomalous situation of a bankrupt vendee coming into a Court of Equity through his Trustee in Bankruptcy and demanding relief based solely on his own default. We believe a careful reading of the real estate contract which we are here concerned with [Tr. 96-99, incl.] will clarify most of the legal questions involved in this appeal. It is a form frequently used in buying and selling real estate. By its expressed terms it makes the performance of the covenants on the part of the vendee a condition precedent to any performance on the part of the vendor. It also expresses that time is of the essence and, in the event or failure to comply with the terms of the contract by the vendee, the vendor shall be released from all obligations of law and equity to convey said premises and the buyer shall forfeit all right thereto and to all money theretofore paid under the contract. It is admitted that the bankrupt vendee made only two monthly payments amounting to approximately $350.00 on the principal sum due, and that on February 5, 1946 when appellant, Jennie Wuchner, served notice on him demanding payment of the total amount due forthwith, he was in default for five monthly payments, amounting to $1,000. He was also in default in the payment of taxes. The Trustee, in his petition for an Order to Show Cause under which pleading appellant was taken into the Bankruptcy Court, makes no explanation or excuse for bankrupt's default but rests his action solely on the ground that the bankrupt tendered the entire amount due under the contract, according to appellant's demand of February 5, 1946, to

the appellant on February 11, 1946, and that she wrongfully refused to accept it, and that he, as Trustee, is entitled to specific performance of the contract. This is the only ground for relief set out in the petition [Paragraph II, Trustee's Petition for Order to Show Cause, Tr. 15-16], which allegation was denied by appellant's answer [Tr. 222], and this was the sole and only issue raised by the pleadings, and upon such issue the matter was tried before the Referee. We submit that the burden was upon the Trustee to prove his sole allegation for relief, *i. e.,* that on February 11, 1946, the contract was in full force and effect and binding upon both parties, and that the bankrupt vendee on that day made a legal and timely tender of the money due. The petition of the Trustee did not plead waiver, estoppel, fraud, mistake, surprise or any other ground of equitable cognizance excusing the breach on the part of vendee, nor did the Trustee even offer to prove any equitable excuse for the breach. The Referee, in reaching his Findings and Conclusions, and the Court, in sustaining them, followed a theory not applicable to the facts in this case, as clearly shown by the oral testimony and documentary evidence. To reach their conclusions they had to rely solely on waiver, when it was not pleaded or proved, and on a tender when same was not made. They overlooked entirely the fact that the contract is one based on a condition precedent, and any rights accruing to bankrupt under the contract were conditioned upon the strict performance by him of the covenants of payment of the monthly installment and taxes before he acquired any rights under the contract whatsoever. We think it is elemental that a purchaser who sues the vendor for specific performance must plead and prove performance on his part of all conditions of the contract which are precedent to performance by the vendor.

The Referee and Judge also disregarded "time is of the essence" and "forfeiture" clauses in the contract. The Referee and Judge also disregarded the fundamental equity doctrine that a party seeking a specific performance against another must show, as a condition precedent to his obtaining the remedy, that he has performed all things required of him to be performed. It was stipulated in open court that no payments were made on the contract by the bankrupt vendee subsequent to September 1, 1945. [Tr. 144-45.] To reach their conclusions, Referee and Judge had to disregard the explicit language of the contract that, in the event of failure to comply with the terms by the vendee, seller will be released from all obligations of law and equity to convey said premises, and that the buyer will forfeit all rights thereto. [Tr. 98.] In the instant case, all of the rights of the bankrupt vendee terminated on November 2, 1945 by reason of his failure to make the payment due October 1, 1945. No notice to him by the appellant was necessary to accomplish this result. Under the expressed provisions of the contract, this happened automatically. While all the vendee's rights under the contract terminated automatically on November 2, 1945, it remained in force so as to protect the rights of the innocent vendor and to enforce the obligations of the delinquent vendee. To demonstrate the above, it is only necessary to ask what the decision of a Court of Equity would have been if on November 2, 1945, the present vendee, being in default as he was, asked the aid of a Court of Equity to avoid the consequences of his default and compel the vendor to perform some act under the contract. We submit that it is the universal rule, in the absence of a showing of fraud or other equitable excuses, that the Court would not and could not grant such a vendee any relief. So far as the vendee was concerned, the

contract was at an end. He had no rights under it. The vendor, however, not being in default, did have rights under the contract which she could enforce. If the vendee could not complain immediately after an effective default on his part, he certainly could not do so some months later when his defaults had multiplied. That the parties to the instant contract clearly understood its terms we think is conclusively shown by the clause appended to the original contract by a loose rider. It provides, "It is further agreed that any default shall not become effective for thirty (30) days from date of said default. [Tr. 100.] From this, it can safely be assumed that the vendee knew that, under the terms of the original contract, if he was one day late in making a payment, the contract would automatically be terminated and all that he had paid thereunder would be forfeited. The vendee knowing this, we can further assume, as the clause was for his benefit, that he requested and was granted a thirty day grace period, before a default in the monthly payments became effective.

In our main argument we believe we can demonstrate that, under the law, all rights of the vendee under the contract terminated on November 2, 1945; that all acts of vendor subsequent thereto were simply pursuing a remedy given to her under the contract and necessary to terminate and wind up the transaction and perfect her title. Nothing she did or refrained from doing conferred any rights whatsoever on the vendee.

As to the issue of whether or not there was a tender by the bankrupt vendee to appellant Jennie Wuchner, in response to her demand of February 5, 1946, we believe that the documentary evidence and the oral testimony shows conclusively that there never was a tender or an offer by the vendee and that, at most, it was simply an

invitation to vendor to become a party to a three-cornered real estate deal whereby, if everything worked out, she might, at some uncertain date in the future, obtain a lesser sum of money than that actually due her under the provisions of the contract. The record clearly shows that Mr. Poyet, as President of the Angelus Escrow Service Company, attempted to work out a deal by selling the property to Bruno and Berg, which deal, if appellant were willing to enter into it, might have produced a sum somewhat less than the amount owing her, but the conditions attached to that offer were conditions that she did not have to perform to obtain her money. The Angeles Escrow Service Company did not state in its letter of February 11, 1946, nor did Mr. Poyet, its President, testify when on the stand that it was acting on behalf of the bankrupt vendee, Charles E. Hill. There certainly is more evidence in the record to indicate that it was acting for Bruno and Berg than there is to indicate it was acting for Hill, but, irrespective for whom it was acting, it could not couple its offer with conditions that the vendor did not have to perform. If Angeles Escrow Service Company were acting for Hill and it wanted to meet the demand of the appellant of February 11, 1946, all it had to do was to pay her the money and demand a deed, or it could have, under the provision of Section 1500 of the Civil Code of California, deposited the amount of her demand in her name in any bank of deposit in the State and the debt would have been extinguished. This it did not do and the record clearly demonstrates that this it could not do, as the amount of money in the hands of Angelus Escrow Service Company given it by Bruno and Berg was held by it under an express prohibition against using it until it had secured a grant deed from the

appellant, Jennie Wuchner, and a policy of title insurance, and also her signature on the escrow instructions. Hence, even if it were acting for bankrupt vendee, it had neither the willingness nor the ability to make the payment in accordance with the contract of the parties, and where there is neither willingness nor ability, no tender or offer is made.

The contract gives the vendor, in the event of a default by the vendee, the right to declare the total amount due under the contract, payable immediately. In the instant case, the vendor did demand the entire amount due and so notified the vendee on February 5, which was received on February 6, 1946, and with which demand Angelus Escrow Service Company attempted to comply on February 11, 1946. Appellant's notice demanded the payment "forthwith." There can be no question as to the reasonableness of time in meeting the demand. Their actions on February 11, 1946, clearly demonstrate that the time was reasonable. We believe that merely a reading of the contract is sufficient to demonstrate that the thirty day grace period referred to above did not have any reference whatsoever to the remedies the vendor might pursue in the event of a default. The clause in question simply extended the effective day of a default and referred to the monthly payments. The right of the vendor to declare the entire amount due and payable immediately did not come into effect until after an effective default by the vendee, at which time all rights of the vendee under the contract had been terminated and canceled.

ARGUMENT.

Waiver—Specification of Error I.

(A) This was a summary trial in a Bankruptcy Court between a Trustee and a stranger to the bankruptcy proceeding. The appellant was compelled, by an order of the Referee, to come into his Court and answer to the petition of the Trustee making claim to her property. That the proceedings in a Bankruptcy Court of this nature are governed by the ordinary rules of pleading and procedure, there can be no question. In Vol. 8, *Corpus Juris Secundum,* Sec. 364, the general rule is stated as follows:

> "A Trustee in Bankruptcy, in bringing his suit, is subject to the same rules of pleading as if no bankruptcy were pending."

The petition of the Trustee raised one issue and one issue only. Did bankrupt vendee make a valid tender on February 11, 1946, of the money due under appellant's demand of February 5, 1946. No other issue should have been considered by the trial Referee or by the Judge in passing on appellant's petition for review. Waiver was not pleaded. The Referee, however, based his most important Findings and Conclusions on waiver by appellant. [Tr. 42-43.]

> "The party relying upon an equitable estoppel must plead that fact in order that the adverse party may be informed of the nature of the action or defense which he will be obligated to meet." (*Holzer v. Read*, 216 Cal. 119, 13 P. (2d) 697; *Fair Oakes Bond v. Johnston,* 198 Cal. 196, 244 Pac. 335.)
>
> "Issues are made by the pleadings, not by the evidence introduced." (*Shaw v. McCaslin,* 50 Cal. (2d) 467, 123 P. (2d) 915.)

"A party must recover, if at all, according to his pleadings rather than on some other or different cause which may have been developed by the proof." (*Van Goverlitz v. Turner,* 65 Cal. (2d) 425, 150 P. (2d) 278.)

"The doctrine of waiver involves the voluntary relinquishment of known rights." (*Cook et al. v. Commercial Casualty Co.,* 160 F. (2d) 490.)

"It is elementary that an intention to forego or abandon a right is an essential element of waiver." (*Estate of Howe,* 80 A. C. A. No. 7—970.)

In the case of *Nakdimen v. Baker,* 111 F. (2d) 778, at page 782, the Circuit Court for the Eighth Circuit said regarding waiver:

"The short answer to this contention is that Nakdimen did not plead waiver as an affirmative defense and the issue was not raised, considered, nor passed upon in the District Court." (Rules 8 (C), 12 (B), 12 (H), and 15 (B), Rules of Civil Procedure.)

In his Conclusion of Law No. I [Tr. 42], the Referee held "by not legally insisting upon the making of the regular monthly payments * * * the seller waived the provision as to time being the essence." It is difficult, if not impossible, to determine what the Referee means when he uses the term, *"not legally insisting upon."* Does he mean, that, as a matter of law, a vendor or creditor in a written agreement must take some affirmative action each time a payment becomes due or his rights under the

clause making time essential is absolutely lost? If so, what act constitutes *legal insistence?* Does it mean a Court action, or some act less than a Court action? As stated above, this "waiver" which the Referee found as a matter of law was not pleaded and therefore should not have been considered. The Referee made no Finding of Fact supporting this legal conclusion nor is there any evidence in the record, either oral or documentary, which in any way refers to this. In his Findings of Fact II [Tr. 37] the Referee did find as a fact that "no notices of default nor any evidence of demand for payment were proven at the time of the hearing of this matter prior to the demand set forth * * *." The simple answer to this is that, under the contract, no notice of default in monthly payments was required. Whether any notice of default was or was not given was, by no possible stretch of the imagination, within the issues. The Trustee did not prove or offer to prove that any notices were given or not given, and it certainly was not incumbent upon the appellant to do so. The record is absolutely silent on this matter. The Referee injected this issue into his Findings and Conclusions entirely on his own motion. It was neither pleaded by the Trustee nor was any proof even offered by him to establish the fact, one way or another. This negative finding of fact concerning something entirely foreign to any issue in the case attempts to write into the contract of the parties something they did not agree to. The legal conclusion based on such finding is therefore illegal anl void.

Specification of Error II.

(B) The Referee's Conclusion of Law No. III [Tr. 43] again relies on waiver to sustain his position. The particular act that is claimed constituted the waiver here is that appellant, by declaring the entire sum due, waived any right she had to terminate the agreement by reason of any default arising from nonpayment of the monthly installments. Her right to demand immediate payment of the entire amount due under the contract came into existence *only* upon the occurrence of an effective default in the monthly payments. How could the exercise of a right waive the consequences of a default which created the right? The contract had already been terminated by the default. The demand for the immediate payment of the entire amount due under the contract was a remedy expressly given her by the contract itself if default occurred. It was for the purpose of winding up and terminating the transaction one way or another.

Again this waiver was not pleaded nor were any of the acts claimed to constitute the waiver pleaded, or even proved. The general rule followed in California is stated in 25 *Cal. Jur.* 931, Section 6:

> "Sec. 6. Pleading.—The general rule is that a plaintiff who relies upon the waiver of the performance of an act upon which his right of action depends must specifically plead it. If he pleads performance he must prove it rather than some excuse for non-performance; but where he makes out a *prima facie* case he may take advantage of a waiver of performance proved by the defendant even though it is not pleaded. If a plaintiff relies on waiver as

to any defense which would otherwise be available to the defendant under the fact stated in the complaint, the facts constituting such waiver must be pleaded in the first instance."

And again, the same volume, Section 7, states the following:

"Sec. 7. Evidence.—The burden is upon the party claiming a waiver to prove it by such evidence as does not leave the matter doubtful or uncertain."

The Court said, in *Mitchell v. Cheney Slough Irr. Co.,* 57 Cal. App. (2d) 138, 134 P. (2d) 34:

"Moreover, the defendant failed to plead an estoppel. The cause was evidently not tried on the theory that an estoppel was relied upon by the defendant. * * * The rule is firmly established in California and in most other jurisdictions that waiver or estoppel must be pleaded to render it available as a defense."

And in *Krobitzsch v. Middletown,* 72 Cal. (2d) 804, 165 P. (2d) 729, the Court said:

"One claiming a waiver must prove it by such evidence as does not leave the matter doubtful or uncertain."

"The waiver of a contractual right must have been a clear, unequivocal and decisive act of the party showing such a purpose or act to amount to an estoppel on his part." *In re Zimmerman* 35, Federal Supplement 13.

"Where a waiver relied on is not an express one but must be inferred, it is essentially a matter of intention and must be indicated in some unequivocal manner, and the person who alleges its existence

has the burden of proving the waiver by evidence which does not leave the matter doubtful." (*Coca Cola v. Commissioner,* 127 F. (2d) 430.)

"Waiver must be pleaded with particularity and certainty, without leaving anything to be supplied by inference or intendment, and where there are grounds for inference or intendment, it will be against and not in favor of the estoppel. (*Cohan v. American Surety Company of New York,* 120 F. (2d) 393. Certiorari denied, 314 U. S. 667.)

"Estoppel must be assertively pleaded." (*Boles v. Capitol Packing Company,* 143 F. (2d) 87.)

We submit that, as the waiver referred to under this specification was not pleaded nor proved, the Findings of Fact and Conclusions of Law based thereon are illegal and void.

Specifications of Error III, IV and V.

(C) The Referee, over the objections of appellant, allowed the witness, Dora M. Hill, to testify as to conversations she had with Norman Wuchner, son of appellant. [Tr. 147-155.] She testified at the trial that she never had any conversation with Jennie Wuchner, the appellant, and that she was not with her husband, Charles E. Hill, bankrupt, when the original sale was negotiated. She testified she was present when the bankrupt and Norman Wuchner discussed the sale, and that the payments made under the contract were made by check payable to Norman Wuchner, and that he came down to the plant to collect them. She testified that the last conversation she had with Norman Wuchner about payments was in the middle of October, 1945, which conversation was as follows: "Well, as much as I can

recall now, I mentioned that I might be late with the payments then, because I was kind of upset by everything else that had happened; and he told me not to worry about it * * *. He said, 'Don't worry; we can work something out. I'm not interested in having all the money at one time. I want the interest on it over a time for my mother's income.'" [Tr. 153.] The appellant made strenuous objection to all of this testimony (see verbatim objections under Specification of Error III), and at its conclusion moved to strike all of Dora M. Hill's testimony relating to Norman Wuchner on the ground that it was not binding on Jennie Wuchner and was incompetent, immaterial and hearsay. [Tr. 159-160.]

It is to be kept in mind that Dora M. Hill was not a party to the contract. There is no evidence in the record that she even had authority to represent the bankrupt Charles E. Hill at the time these conversations were supposed to take place. (The record shows that her power of attorney to represent Hill was dated November 6, 1945 [Tr. 139], which was subsequent to the conversations with Norman Wuchner.) There is no evidence of any kind in the record that Norman Wuchner had any authority to represent Jennie Wuchner. Dora M. Hill admitted that she had never talked with Jennie Wuchner herself nor had she even been present when Charles E. Hill had any conversations with her. She did not testify that Norman Wuchner represented himself to her or to anyone else as the agent of Jennie Wuchner. She did not testify that she communicated anything Norman Wuchner told her to the bankrupt Charles E. Hill. She did not testify that she or bankrupt relied upon the alleged statements of Norman Wuchner or that they were misled thereby.

We have a situation here of two complete strangers to the contract having conversations or alleged conversations which were not communicated to the principals, being admitted in evidence for the purpose of establishing an agency under which agency the agent waived valuable rights of Jennie Wuchner. We submit that this evidence is and was incompetent on its face and should not have been considered. If any agency in fact existed, the trustee could have very easily established the fact by calling to the stand Jennie Wuchner, Norman Wuchner or Charles E. Hill. He chose instead to try to establish it by the hearsay testimony of the wife of the bankrupt.

The rules of evidence relating to the establishment of agency are well known to this Court and we will refer only to a few authorities on the question.

The general rule is stated in 1 *Cal. Jur.*, p. 698, Sec. 8, as follows:

> "It is a rule of long standing in California that the declarations of an agent not made under oath or in the presence of the principal, and not communicated to or acquiesced in by him, are not admissible to prove the fact of his agency. One who deals with another upon his mere statement that he is the agent of a third person takes upon himself the risk of being able to show that such agency existed. If, instead of satisfying himself by an independent investigation, he accepts such statement and is deceived, he is the victim of his own credulity. * * * (And cases cited thereunder.) The rules just stated are applicable not only as

proof of the fact of the agency but also of the extent of the agent's authority."

"Evidence of the declarations of a third person that one signing a contract was the agent of the defendant is hearsay and hence inadmissible." (*Scott v. Los Angeles Mountain Park Co.,* 92 Cal. App. 258, 267 Pac. 914.)

"The admissions, statements and declarations of an agent other than his own testimony in the case in which the issue arises are not admissible to prove such agency." (*Syar v. U. S. Fidelity & Guarantee Co.,* 51 Cal. App. (2d) 52, 125 P. (2d) 102.)

"The declaration of a person that he is the agent of another is not competent evidence of agency unless it was made in the presence of, or was communicated to and acquiesced in by the principal." (*Dooly v. West American Commercial Insurance Co.,* 133 Cal. App. 58, 23 P. (2d) 766.)

"Notwithstanding broad statements in a few cases that the declarations of an agent are admissible against the principal to show the extent of the authority of the agent, it is elementary that the acts or representations of an agent are not admissible against the principal to prove the power or authority of the agent or the scope or extent thereof, unless such acts or declarations were done or made in the presence of the principal or were within his knowledge or were authorized or ratified by him, or there is other evidence of authority. This rule refers to declarations made by the agent out of Court, off the

witness stand, or otherwise than in his sworn testimony, and it means that such declarations cannot be testified to by a third person for the purpose of proving the scope or extent of the authority of the agent." (3 *Corpus Juris Secundum,* 285, Sec. 324-C.)

And again, in the same volume, at p. 276, Sec. 322 C (1), it is stated:

"In the absence of other evidence of agency, the extra-judicial declarations of an alleged agent to a third person are not admissible against the alleged principal to prove agency."

The testimony itself of Dora M. Hill did not, in fact, prove agency. She testified she was worried and upset, not because her husband could not keep up their payments but because he was held in jail, charged with the commission of an infamous crime. Norman Wuchner simply told her not to worry and that he was not interested in having all the money at one time but wanted the interest for his mother's income. At best, it was merely the voluntary sympathy of a stranger to the contract. Hill was in no sense misled by it.

From the foregoing, we believe it is clear that not only was waiver not pleaded but it was not proved and that there is not one scintilla of competent evidence in this record, either oral or documentary, that can support or uphold the Findings and Conclusions of the Referee based on waiver by appellant.

Specifications of Error VI, VII, VIII, IX and X.

(D) The appellant, Jennie Wuchner, after the contract had been canceled, and for the purpose of terminating and winding up the transaction one way or another, served on bankrupt Hill a notice dated February 5, 1946, demanding payment of all sums then due under the contract forthwith. This remedy was expressly given to her by the contract in the event of vendee's default and is a procedure usually followed by a vendor when the vendee defaults on a contract. The notice called for the payment forthwith of all sums due under the contract which, as of February 5, 1946, amounted to $4,912.63. The appellant never heard anything from the vendee, Charles E. Hill, in response to this demand, although it appears in the record he received the notice on February 6, 1946. Nor did she receive any word from Dora M. Hill, the wife of the bankrupt vendee, who at that time was purporting to act for him under a power of attorney, although she also received a copy of the demand on February 6, 1946. On February 12 or 13, 1946, the appellant, Jennie Wuchner, did receive a letter from the Angelus Escrow Service Company signed by one Henry F. Poyet, its President. [Tr. 115-116.] The letter enclosed certain escrow instructions which the appellant, Jennie Wuchner, had to sign. The instructions constituted a new contract between herself and the defaulting vendee, Charles E. Hill and the Angelus Escrow Service Corporation. The instructions themselves, and the statement of identity, take up nine pages of the printed record [Tr. 116-125, incl.] and contain many conditions which the appellant had to agree to. Poyet, neither in the letter to the appellant nor in his testimony when he was on the stand, stated that the Angelus Escrow Service

Company was acting on behalf of Charles E. Hill, bankrupt, or that it was making the offer on behalf of the said Hill, with his assent. The letter simply stated that, in accordance with appellant's demand of February 5, 1946, directed to Charles E. Hill, there was on deposit at that time with the Angelus Escrow Service Company the full amount of her demand "subject to the escrow instructions for clear title as therein set forth." At the trial it was developed by the testimony of Poyet that, as a matter of fact, there wasn't any money in the particular escrow referred to in his letter to appellant of February 11, 1946 [Tr. 129] and that, as a matter of fact, there was no money in the hands of the Angelus Escrow Service Company to which bankrupt Hill was entitled, had any claim to, or any direction over. It developed, by Poyet's testimony, that the only money in any way referring to this transaction which was on deposit with the Angelus Escrow Service Corporation was some money belonging to Frank Bruno and Teddy Berg, as set out in Trustee's Exhibit No. 5 [Tr. 136-137], wherein the said Bruno and Berg delivered to the Angelus Escrow Service Company the sum of $4,912.63 under the following conditions: "which you *are to use when you* can comply with the foregoing instructions of Charles E. Hill, purchasing the property therein described free of liens and encumbrances as therein set forth, and, in addition thereto, you will record for us concurrently with the deed from Mrs. Jennie Wuchner to Charles E. Hill a deed from Charles E. Hill and Dora Hill, his wife, to Frank Bruno and Teddy Berg to the above described property. You will have the title showing free and clear of encumbrances said property to Frank Bruno and Teddy Berg." While the record is silent as to who the Angelus Escrow Company represented, we believe it is quite clear from the

above letter that it represented Bruno and Berg. Poyet failed to state that Angelus Escrow Service Company was acting for the defaulting vendee, and Mrs. Hill did not testify that the Angelus Escrow Service Company was acting on behalf of Charles E. Hill or of herself. It is therefore safe to assume from the record that Angelus Escrow Service Company was acting for and on behalf of Bruno and Berg.

From a reading of Angelus Escrow Service Company letter [Tr. 115-116] to the appellant, and Bruno and Berg's letter to it [Tr. 136], both under date of February 11, 1946, it is clear that the appellant could not receive the amount of her demand of $4,912.63, which included interest only up to February 5, 1946, until she performed various conditions which were imposed upon her by the above referred to letters, escrow instructions and statement of identity which were made a part of the transaction. First, she had to enter into a new written agreement with Charles E. Hill and the Angelus Escrow Service Company which constituted the escrow instructions and an agreement with Frank Bruno and Teddy Berg, as they made the escrow instructions a part of their letter when they conditionally deposited the money with the Angelus Escrow Service Company. Second, she had to agree in the escrow instructions that the escrow would remain open until May 6, 1946, or more than three months after the date of her demand, and that at that time, unless the escrow was further extended, she would only receive the sum of $4,912.63, which included interest only to February 5, 1946. Third, she had to also sign a statement of identity giving her residence or residences for the past five years and also a statement as to any former marriages. Fourth, she also had to deposit a deed and a policy of title insurance. Under the setup

that she was required to enter into, she had to do all these things before she could obtain any money. She was not advised who made the deal with Bruno and Berg, who were conditionally putting up the money, and she could not know what representations might have been made to Bruno and Berg to induce them to enter into the contract. For all she knew, they might rescind their agreement prior to May 6 at the close of the escrow and demand the return of the money they had deposited. In this connection, if she signed the escrow instructions she might become liable for costs and attorney fees of the Angelus Escrow Service Company, if any litigation developed between the Hills and Bruno and Berg. This was a clear attempt on the part of either Angelus Escrow Service Company or Bruno and Berg, who were all perfect strangers to the contract between the appellant and the vendee, Hill, to impose conditions upon her that were not provided for in the contract. The bankrupt Hill had defaulted the contract. His obligation, as of February 5, 1946, was plain and unambiguous. To obtain legal title to the property in question and a policy insuring such title, all he had to do was to pay to the appellant the amount of her demand, and neither he nor the Referee nor anyone else could write a new contract for her and impose obligations and conditions upon her which she had never in any manner agreed to. It has been well said that the best way to handle a debt is to pay it. He, Hill, or someone with his assent, acting for him and in his behalf, could have offered Jennie Wuchner the money or a check for the money, or he or someone acting for him could have simply deposited the money to her credit in any bank in the State and, in accordance with Section 1500 C.C., the debt would have been extinguished, he would have obtained title and the matter would have

been closed. This he either refused to do or could not do —the result is the same. The Referee, in his Findings and Conclusions of Law, referred to in the above Specifications of Error, undertook to write into the contract of the parties a long list of conditions and obligations, which were to be performed by appellant, and which were not in the contract and to which she never agreed. Evidently the Referee and the Court, in upholding Referee's Findings and Conclusions, interpreted this contract as though it were based on a condition subsequent. The Referee's Finding of Fact No. II [Tr. 36-37], wherein he held that the "receipt of the money by the appellant was *contingent upon her providing* the buyer with a Certificate of Title Policy," is clearly in error. All of the conditions in the contract are conditions precedent to be performed by the buyer before he had any rights under the contract. At most, when the final sum was due, the obligation of the appellant to furnish deed and policy of title insurance was concurrent or mutual. There was no obligation upon her to first do anything to obtain her money.

It might be well to first refer to the pertinent sections of the Civil Code referring to tender or offer of performance.

Section 1487, Civil Code, is as follows:

> "*By whom to be made.* An offer of performance must be made by the debtor or by some person on his behalf and with his assent."

It is clear from the record in this case that the debtor did not make an offer and there is no showing that any other person made an offer on his behalf or with his assent.

Section 1490, Civil Code, provides:

"*When offer must be made.* Where an obligation fixes a time for its performance, an offer of performance must be made at that time within reasonable hours and not before nor afterward."

Section 1493, Civil Code is as follows:

"*Offer to be made in good faith.* An offer of performance must be made in good faith and in such manner as is most likely under the circumstances to benefit the creditor."

Section 1494, Civil Code, provides:

"*Conditional offer.* An offer of performance must be free from any conditions which the creditor is not bound on his part to perform."

And Section 1495, Civil Code, provides:

"*Ability and willingness essential.* An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer."

Section 1500, Civil Code, provides:

"*Extinction of pecuniary obligation.* An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this State, of good repute, and notice thereof is given to the creditor."

Section 1501, Civil Code, provides:

"*Objections to mode of offer.* All objections to the mode of an offer of performance which the creditor has the opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor if not then stated."

The leading case in the State of California passing on most of the questions involved in this appeal is *Glock v. Howard & Wilson,* 123 Cal. 1-21, incl., 55 Pac. 713, 43 L. R. A. 190. This case was decided in 1898 but it has been followed and approved by a great many subsequent cases of California Appellate and Supreme Courts and also by the U. S. Circuit Court of Appeals for the Ninth Circuit. The case involved a contract for the sale of real estate, the consideration to be paid in installments with a provision that time was essential, and performance by the vendee was a condition precedent, on the performance of which depended the agreement of vendor to convey, and with a provision if plaintiff failed to perform vendor was released from all obligations to convey and all sums paid thereunder were forfeited. After effective defaults on the part of the vendee, he attempted to tender to the vendor all sums due and offered to comply with all terms and conditions of his contract and demanded a deed. The Court, on page 4 of the opinion (123 Cal.) states the issue raised as follows:

> "The case stands then upon this proposition: That under a contract for the sale of realty, where time is of the essence, a vendee, after breach of covenant to pay, performance of which is made a condition precedent to his right to a conveyance, may, without excusing his default, by a tender of the amount due, acquire some legal or equitable right which warrants his recovery of the moneys he has paid."

And again, on page 9 of the opinion, the Court said:

> "One other point invites brief attention before application is made of these well settled principles to the contract and facts in the case at bar. In this, as is usual in such contracts, time is expressly de-

clared to be essential. It was always considered essential at law but it has sometimes been said that equity will not or does not so regard it. This, however, means no more than that, if equitable grounds in excuse of a default are shown, equity to avoid forfeiture will relieve the vendee and uphold a tender made after time. * * * In no other sense is the expression true. Where time is expressly made of the essence of the contract, equity will not ignore the provision, for equity follows the law and will neither make a new contract for the parties nor violate that which they have freely and advisedly entered into."

And again, in the last paragraph of page 10 of the opinion, the Court said:

"One thing more he may do, but this is rather incidental to the fact that he has made the contract than a right growing out of it. It has heretofore been said that in certain cases equity will relieve the vendee from the effect of a breach of his covenant to pay upon a day certain. When such relief is granted, it is only after a showing of fraud, mistake, surprise, or other ground of purely equitable cognizance excusing the breach. Now, as the vendee in default may maintain such an action, so may the vendor call the defaulting vendee into a court of equity and compel him to show why all his rights under the contract should not be held to be at an end. The vendor, when he prosecutes such an action, does so to cut off the possibility of any future claim by the vendee to equitable relief which might embarrass or cloud his title. In some forums, this is designated an action for rescission. With us, it is commonly called an action to foreclose the vendee's rights."

Such an action, and so designated, was filed by the appellant herein in the State Court, which is still unanswered and pending [Tr. 16], before she was summarily compelled to appear in the bankruptcy court.

Continuing in the *Glock v. Howard & Wilson* opinion, the Court, in the last paragraph on page 14, made a pertinent observation as follows:

> "It would be to the last degree unjust and inequitable to allow a vendee, after his default under such a contract, to put the vendor in default by a mere tender. The practical effect of such a rule would be that a vendee, without risk, could speculate indefinitely in the land of the unfortunate vendor. The vendee would enter into a contract in which time would be declared of the essence and stipulate under condition precedent, as in this case, to make payment at a certain time. Failing to make payment, he would three months, six months, one year, or, as in this case, over three years after the date of the failure, make an offer to perform and, if the land had risen in value, according to the theory of respondents here, could compel performance."

And Judge Henshaw, in concluding his opinion, on page 16 of the opinion states:

> "In the case at bar, the payment of the final amount under the contract, at the time and in the manner agreed upon, was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment, the vendee committed a breach, and no affirmative act upon the part of the vendor was necessary to bring about this result. Months after, and without any equitable showing to relieve the default, the vendee makes tender and, because of its refusal, claims the right of recovery.

> But the vendor, in refusing to accept the tender and to repay the money, is neither violating his contract nor rescinding it or treating it as at an end. He is standing squarely upon its terms. The vendee is within the rule declared by Pomeroy and above quoted. The contract is made to depend upon a condition precedent. By its terms, no right is to vest in the vendee until certain acts of payment have been done by him, and a court of equity, no more than a court of law, will relieve a vendee under such circumstances from the penalties arising from the breach of such condition in the absence of an equitable showing to excuse his default. None is here even attempted to be made."

Another leading California case is *Troughton v. Eakle,* 58 Cal. App. 161, 208 Pac. 169, (rehearing denied by Supreme Court.) This case discusses in considerable detail the question as to the validity of a tender when coupled with a condition which the vendor did not have to perform. In the *Troughton* case, as in this one, a contract for the sale of real estate was involved. It called for annual payments of $3,000 per year until $7,500.00 had been paid, whereupon vendor agreed to deliver a deed and take back a mortgage for $24,500.00 as the full purchase price. The final payment was due on October 1, 1920 and the vendee attempted to make a payment of the sum due, but, as a condition to his offer, required the vendor to first deliver a deed. The vendor refused. The action was for the amount of money that the vendee had previously paid to the vendor. The lower court granted a judgment to the vendee for $6,300.00. In reversing the lower court's decision, the Appellate Court, through Judge Burnett, expressly approved the *Glock v. Howard* case hereinabove quoted from and, regarding the purported

offer of the vendee, stated as follows on page 165 of the opinion:

> "The parties were very careful to provide that the performance, by plaintiffs of their covenants, was to be a condition precedent to the obligation of defendant to convey the title. When plaintiffs paid the money or made a valid offer to do so, they could demand a conveyance and not before. The covenants are not concurrent or reciprocal, as sometimes termed, and hence it necessarily follows that plaintiff's payment of the money or offer to pay could not be coupled with the condition that the conveyance be made before the money was transferred. Plaintiffs' obligation was absolute and unconditional to pay before they could call upon defendant to act at all, but if they paid according to their agreement, or offered to pay, and defendant refused to accept the money, or if by the conduct of defendant plaintiffs were prevented from making such payment or offer by depositing the money as provided by Section 1500, C. C., they would be in a position to compel conveyance or to recover the money already paid. This seems plain on principle and is in consonance with the authority cited by the appellant."

And again, on page 167, the Court continued:

> "Unless we are to depart radically from the terms which the parties herein deliberately adopted to express their intention, we must hold that plaintiffs were required to perform their agreement or offer to do so before they could place the defendant in default. But if their performance was made precedent and unconditional, it necessarily follows that if they relied upon an offer or performance or tender it must also be absolute and unconditional in order to impose upon defendant an obligation to convey. An offer

to perform could, of course, be no more nor less than a legal effort to do what the contract required. That is, to pay the money unconditionally. But respondents admit that the plaintiffs did not have the money themselves to make the final payment falling due October 1st and, in order to prevent their forfeiture, made arrangements with a Miss Forgeus, by which she agreed to advance the money to them for this purpose upon the condition that respondents would convey the land to her, Miss Forgeus, *making it a condition* that the money should not be paid over to Mrs. Eakle except upon condition that Mrs. Eakle executed her deed."

The Court reviewed the evidence offered at the trial in considerable detail. It developed that the Troughtons got a Miss Forgeus to deposit the $5,000 due October 1 in the Bank of Williams and instructed the cashier to pay it over to Mrs. Eakle, vendor, when they had a deed from Mrs. Eakle to Miss Forgeus. The Court, on page 170 of the opinion, continued:

"Defendant manifestly was under no obligation to give heed to that proposal. Her duty was to convey to plaintiffs, upon their payment or unconditional offer of payment of said sum. Moreover, under Section 1495 of the Civil Code, an offer of performance is of no effect if the person making it is not able and willing to perform according to the offer. It clearly appears from the testimony of the witness (the bank cashier) that he could not and would not pay over the money until he got the deed for Miss Forgeus. Hence, he had neither the ability nor willingness to make the payment in accordance with the contract of the parties herein. * * * Under the circumstances, whatever offer or promise was made by Mr. Stovall (bank cashier) did not put appellant in default. At

least it involved a condition which he had no right to impose. But if it could be said that an offer to pay the money if appellant would execute a deed might be regarded as satisfying the requirements of the contract, and if Mr. Stovall disregarded his instructions and made such an offer, the promise was futile because of his inability to perform."

And the Court further said, on page 172 of the opinion:

"It may be, as suggested by respondents, that, if she had accepted the conditional offer, she would have received the money and the note and mortgage would have been executed, but she had the legal right to stand upon her contract and to insist that respondents comply with its terms."

In the *Troughton* case, the vendees made a second offer, or tender, on October 2, the first offer having been made on October 1, the date the final sum was due. Regarding this, the Court said, at the bottom of page 172:

"But, as we have seen, time was made of the essence of the contract and the payment was to be made not later than October 1. If any forfeiture occurred, it was complete on that date and it could not be undone by any act of respondents on a later date. Besides, it appears from the record that the offer was made on October 2 on the expressed condition that she would execute a deed to Troughton, and the latter to Miss Forgeus, before appellant should receive the money. Indeed, it is admitted by respondents that plaintiffs were able only to pay this money to defendant upon condition that she execute her deed. Such was not the engagement of the parties and there is no question of their right to make the unconditional payment an essential pre-requisite to entitle plaintiff to demand a deed."

Both the *Glock v. Howard & Wilson* case and the *Troughton* case cite many authorities for the principles enunciated in the two opinions. These principles have been followed by the California Courts down to the present time.

It is interesting to note that the facts in the *Troughton v. Eakle* case are very similar to the facts in the present case. In the *Troughton* case, a stranger to the proceedings deposited the amount due the vendor in a bank but under a condition that the vendor first execute a deed before the money was to be available to her. In the case under consideration, Bruno and Berg, who were strangers to the contract and not acting for bankrupt, deposited the money due the vendor with the Angelus Escrow Service Company, upon condition that the money could not be used until the Angelus Escrow Service Company secured the signature of appellant vendor to escrow instructions containing many conditions, among which was one that appellant vendor could not receive the money for over three months, also her signature to a statement of identity. Besides this, she had to deposit a grant deed and a title insurance policy in the escrow.

We reiterate again that the only issue involved in this action that is raised by the pleadings and was therefore properly before the Court is the question of whether or not the bankrupt vendee made a legal tender of the money due appellant on February 11, 1946, in response to her demand of February 5, 1946.

Section 1487 of the Civil Code states that an offer of performance must be made by the debtor or by someone on his behalf and with his assent. In this case, the bankrupt Hill never offered to perform. Hill never communi-

cated with appellant in any way. The only information she received concerning the attempted offer was the letter from Angelus Escrow Service Company of February 11, 1946. [Tr. 115-116.] There is nothing in the record to show that Angelus Escrow Service Company made the offer on behalf of Hill or with his assent. In fact, we think the record is clear that it was acting for Bruno and Berg, the persons who were conditionally furnishing the money. There certainly is nothing in the record to show that it was acting for Hill or made what offer they did make on his behalf or with his assent. Poyet stated that he was representing the bankrupt Hill as his attorney, but it is not claimed, and the record does not show that he made any offer of performance to the appellant on behalf of the bankrupt or with his assent. Dora M. Hill, wife of the bankrupt and his attorney in fact, did not make any offer of performance on Hill's behalf or with his assent. We think the record shows conclusively that no one made any offer of performance of appellant's demand of February 5, 1946 on behalf of the bankrupt or with his assent. When appellant received the letter from Angelus Escrow Company on February 12, 1946, containing the escrow instructions and conditions, it was impossible for her to know that even an attempted offer was being made on behalf of the bankrupt Hill. It is safe to presume that she knew that Hill was in the penitentiary; that the property had been abandoned and that Hill could not meet his obligations. When she discovered that the only money in sight was the money put up conditionally by Bruno and Berg, she had a right to believe that no offer of performance was being made by Hill or anyone on his behalf and that strangers to the contract were attempting to speculate with her property.

Under Section 1493 of the Civil Code, the offer of performance must be made in good faith and in such a manner as is most likely under the circumstances to benefit the creditor. We submit that in this case the record conclusively shows that the pretended offer was not made in good faith and was not made for the purpose of benefiting the appellant.

Under the escrow instructions, appellant had to wait until after May 6, 1946 before she could even demand the money that was due her from Hill on February 5, 1946. In deciding whether she should disregard the letter from the Angelus Escrow Service Company of February 11, 1946, she had to consider what her position would be if she signed the escrow instructions and entered into a new three-cornered agreement. First the deal was to be tied up for over three months. In the event the market for real estate declined in that interval, she had to consider the possibility of Bruno and Berg rescinding their agreement to purchase the property and obtaining the return of the money they had conditionally deposited with Angelus Escrow Service Company. In that event—and it was a very probable one—she would be left holding the proverbial "bag." She could not sue Bruno and Berg as she had no dealings with them. Nor did she have any knowledge of what representations were made to Bruno and Berg to induce them to purchase the property. She knew the Hills were insolvent and badly involved with other creditors. Not only the fact that the letter of Angelus Escrow Service Company of February 11, 1946 was not a legal offer of performance, but simple business prudence would compel her to disregard said letter.

We believe Sections 1494 and 1495 of the Civil Code, which provide that an offer of performance must be free

from any condition which the creditor is not bound to perform, and that an offer is of no effect if the person making it is not able to perform, need no further elaboration. Any offer made to appellant in this case was conditioned and the party making it did not have the ability to perform.

The vendee did not have any rights under the contract on February 5, 1946, the date appellant made demand upon him. His rights had all been cancelled automatically by his own default. Nothing he could do subsequent to this could restore to him any rights under the contract, nor could any act on his part put the appellant in default. Appellant did not have to give him any notice under the contract whatsoever. She could have remained inactive and stood upon the forfeiture. However, she chose to pursue a remedy given her and demand the entire amount forthwith. This was for the purpose of winding up the transaction and perfecting her title and, to avoid any subsequent action on the part of the vendee under Section 3275 of the Civil Code. She gave appellant the opportunity of paying the entire amount due and getting a deed for the property. For his failure or inability to take advantage of this offer, the appellant can in no way be held responsible.

The obligation of the bankrupt was to pay "forthwith" or "immediately." The exact lapse of time these terms denote we do not believe material here. The demand was received by the bankrupt on February 6, 1946. He attempted to respond to it on February 11, 1946 and demonstrated his utter inability to perform. The question of reasonableness of time is therefore not involved.

The Referee's holding, as a Conclusion of Law [Tr. 42], that buyer had thirty days after February 6, 1946,

in which to comply with the demand is clearly in error. It is not supported by any fact in the record and is contrary to the express terms of the contract itself. The vendee did not have any rights under the contract of any kind on February 5, 1946. All rights had been terminated by his own default on November 2, 1946 and on successive defaults thereafter. The thirty day provision had no relation to remedies the appellant could pursue after there had been an effective default on the part of vendee.

While it was not incumbent upon the appellant to give the bankrupt any notice of the cancellation of the contract, she had a perfect right to do so and she did give him such notice, both on February 8, 1946 [Tr. 101], and on February 14, 1946 [Tr. 115], so that there could be no misunderstanding on the part of the bankrupt as to his position in the matter. He knew from these notices that appellant was standing squarely on the contract and that his rights thereunder had been cancelled and forfeited; that to wind up the transaction under her demand of February 5, 1946, he could pay her all money due and obtain the legal and equitable title to the property.

From the above, it follows that Findings of Fact and Conclusions of Law of the Referee, and his Order issued pursuant thereto, and the Order of the District Judge upholding said Findings and Conclusions are not supported by any evidence in the record and are against the evidence, and the Order of the District Judge in sustaining said Findings and Conclusions is error and should be reversed.

JURISDICTION.

Specification of Error XI.

(E) The appellant at all times in this proceeding made timely and continuing objection to the jurisdiction of the Bankruptcy Court to try this matter. The appellant, Jennie Wuchner, filed an action in the Superior Court of Los Angeles County on February 20, 1946, against the bankrupt Hill to quiet title and foreclosure of purchaser's rights. Thereafter, on April 1, 1946, an involuntary petition in bankruptcy was filed against Hill and on May 1, 1946, said Charles E. Hill was adjudicated a bankrupt. At the time the involuntary petition was filed and on the date he was adjudicated a bankrupt, he had no interest to, or any rights in, the real estate involved in this action. As shown by the foregoing argument, all of his rights had been terminated and cancelled by reason of his defaults under the contract between the parties and also his default in meeting appellant's demand of February 5, 1946. This was not a question involving a matter of bankruptcy but the most it involved was a question arising out of a bankruptcy. We believe it to be the rule that a Bankruptcy Court will not interfere with the jurisdiction of a State Court when neither the legal nor equitable title to the real estate involved nor the possession thereof was in the bankrupt at the time of the filing of the petition in bankruptcy. The action pending in the State Court brought by appellant, is the ordinary action required by title companies to foreclose of record the rights of a defaulting vendee. The action was pending when the trustee was appointed. He had a perfect right, if he wanted to, to appear and defend said action on behalf of the bankrupt's estate. For some reason undisclosed, Trustee did not choose to do this but insisted upon bring-

ing the appellant into the Bankruptcy Court for the purpose of trying out the title to her property in a summary proceedings. The bankrupt had no interest in this property, either legal or equitable, as of the date the bankrupt's petition was filed, and he did not have legal possession of said property, either actual or constructive. The property had been abandoned. The trustee can have no better right than the bankrupt and the claimed possession of the property by the trustee was not a legal possession but at most that of a trespasser.

We do not believe that the Referee had any jurisdiction to try this matter and the petition of the trustee should have been dismissed. It has sometimes been loosely said that the vendee under a contract for the sale of real estate holds the equitable title. This statement must be qualified and limited to the extent that a vendee holds equitable title only insofar as he has made payments on the purchase price for the property and such equitable title as passes to a vendee under such a contract terminates immediately upon his default in the performance thereof.

As was stated in *California Delta Farms v. Chinese Farms*, 207 Cal. 298, 278 Pac. 227:

> "the equitable doctrine that the vendee, under a contract of sale, is the owner of the property applies only to the payments made on the purchase price; the full equitable title matures only upon the full payment of such price."

The rule is well stated in the case of *Whittier v. Stege*, 61 Cal. 238, wherein, at page 241, the Court said:

> "When therefore the defendants, after they had obtained possession lawfully, substituted repudiation of the contract and refusal to comply with its terms, for performance or willingness to perform, they di-

> vested themselves by their wrongful act of the equitable estate which they acquired under the contract and became trespassers or tenants at will, against whom their repudiated vendors could maintain ejectment."

And again, to the same effect, the Court held, in *Fisher v. Chaffee,* 49 Cal. App. (2d) 100, 121 P. (2d) 51, as follows:

> "It follows under these established rules that, having refused to further perform the contract, these vendees could not invoke or rely upon the terms of the contract against the vendor. The vendor was therefore free to maintain an action in ejectment to recover possession of this land."

In the case of *Mayer v. West,* 96 Cal. App. 31, 273 Pac. 849, the Court, after reviewing many authorities on this question, said:

> "It is elementary that a vendor may recover possession in ejectment from a vendee who repudiates his contract."

And in *Andrews v. Karl,* 42 Cal. App. 512, 183 Pac. 838, it was held:

> "Where a vendee in possession has refused to complete the contract, he may be treated as one who has abandoned the contract under which he entered."

And in *Woodward v. Hennegan,* 128 Cal. 293, 60 Pac. 769, it was held:

> "When a vendee has repudiated the contract and has refused to pay anything further upon it, the vendor is entitled to take possession and proceed to clear his title, and is no longer bound by the provisions of the contract."

This Court, in a recent case, *Fed. Farm Mortgage Corp. v. Davis,* 132 F. (2d) 663, also passed on this question. That case involved a contract for the purchase of land where vendee entered into possession of the property but failed to comply with the provisions of the contract with respect to payments and taxes, and vendor notified them that the agreement was cancelled and all their rights thereunder terminated. Vendor commenced a suit in ejectment in the State Court. A short time later, vendee filed a petition in bankruptcy, listing the land in question as an asset. The vendor moved to strike the same from the bankruptcy schedule. The motion was denied by the Commissioner and, on review, the District Judge upheld the Commissioner's order. This Court, in reversing the District Judge, through Mr. Justice Healy, said in part as follows:

> "In ruling on the motion, the Court relied on Section 3275 of the California Civil Code, and on our opinion in Neely vs. Gunning, 124 Fed. 7. We think the ruling was error. The California Courts appear not to apply the quoted statute to forfeitures of installment contracts for the purchase of land where time is of the essence. In the very recent case of *Ballard v. MacCollum,* 15 Cal. 2d 439, 101 P. 2d 692, the Supreme Court observed: 'In this State, by a long line of decisions, we have recognized such forfeitures in installment contracts for the purchase of land and in conditional sale of goods. * * * The leading case on the subject in this jurisdiction is *Glock v. Howard & Wilson,* 123 Cal. 1, 55 P. 713.'"

This Court quoted with approval from the *Glock* case and *Whittier v. Stege, supra,* and then continued:

> "We conclude that, upon the forfeiture of this contract for the default of the vendees, the latter ceased

> to have any interest, legal or equitable, in the land, and the continued possession was therefore without right."

This Court had occasion to again pass on this question in the very recent case of *Starr King School for the Ministry v. Kinne,* 146 F. (2d) 8. The Court, on page 9 of its opinion, said in part as follows:

> "This Court, in *Fed. Farm Mortgage Corporation v. Davis,* 132 Fed. 2d 663, decided the California law with respect to the termination of contracts for sale of land on installment payments containing the provisions of the instant contract set forth above. We there held that law to be that, on the non-payment of installments when due, the vendor could, by notice, terminate the contract and that the vendee was not entitled to notice of a future termination with right to make compensation in full and thereby acquire title to the land. * * * Since the contract was terminated before the petition in bankruptcy was filed, the estate in bankruptcy acquired no interest in the lands in question and the District Court erred in affirming the order of the Conciliation Commissioner. The order is reversed and the case remanded for proceedings in accord with this opinion."

A petition for a writ of certiorari in this case was denied by the U. S. Supreme Court on April 30, 1945, 89 *Law Edition* 1970, 325 U. S. 50.

From the above, we do not believe the District Court had any jurisdiction to determine the matter involved in

this appeal. It has been stated many times that the test of jurisdiction to determine a matter in controversy between a trustee in bankruptcy and a third person is the necessity of doing so, in order to administer the estate. No such necessity existed here. The Trustee could have appeared and filed his answer to appellant's action in the State Court. If he were successful, whatever he received would belong to the bankrupt's estate and would be administered by the Bandruptcy Court. If he lost, the matter would be at an end. The Trustee bases his contention that the Bankruptcy Court had summary jurisdiction to grant specific performance in this case solely on the ground that bankrupt had possession of the property at the time the petition in bankruptcy was filed. We submit that this record shows conclusively that the bankrupt did not have legal possession. He had no right to the property. He was a mere trespasser. The Court, in the case of *In re Logan* (D. C. N. Y.), 196 Fed. 678, said:

> "Of course mere possession is not enough. The finding must be, and the facts must warrant the finding, that the bankrupt, was the true owner."

For the reason that bankrupt did not have legal possession or legal or equitable ownership of the property and because a summary action was not necessary to administer the bankruptcy estate, we submit that Bankruptcy Court did not have jurisdiction in this matter. The appellant was entitled to have the matter determined in a plenary action.

AS TO ALL ISSUES.

Specifications of Error XII and XIII.

(F) This is an equitable action for specific performance. We do not believe that any equitable grounds were pleaded or proved which warrant the Referee and the District Judge in so ordering. The provisions of the contract between the parties here were clearly disregarded. No effect was given to the significance of the "time is of the essence" and "condition precedent" clauses nor the provisions which automatically terminated and cancelled all rights of the vendee under the contract, upon his default. We believe it is the universal rule that a person seeking the extraordinary powers of a court of equity must not only plead but also must clearly prove that cogent equitable grounds exist to justify such a request. In his petition for an order to show cause, the Trustee at best stated facts which might, if true, constitute a legal cause of action; certainly not an equitable one. We believe the equities here are entirely with the appellant. She, in good faith, attempted to sell an improved business property which she owned to the bankrupt vendee under a sales contract. The vendee went into possession of the property in July 1945, on the payment of a very nominal sum. He made only two subsequent monthly payments when he defaulted. The total amount of all the payments paid by the bankrupt Hill to the appellant is much less than the reasonable rental value of the property for the period appellant has been deprived of its use. She has been forced to undertake prolonged and costly litigation to es-

tablish her rights. While there is no evidence in the record, anyone with a knowledge of human nature would know, by the very existence of this litigation, that the property involved has increased in value, and we think that the record clearly shows that two strangers to the contract, namely Bruno and Berg and the Angelus Escrow Service Corporation, were attempting to speculate with the property of this appellant. The order of the Referee and the District Judge decreeing specific performance in effect orders the vendor to do things which she no way at any time agreed with anybody to do. This is ordered, on the petition of a Trustee who did not allege, let alone prove, that the bankrupt he represented performed his covenants and agreements according to the terms of the contract. In fact, he admits that his bankrupt was in default. An original Findings of Fact of the Referee contained the following statement:

> "The said George T. Goggin did ascertain that there was a substantial equity in and to the said real property above the balance due to the respondent, Jennie Wuchner."

The Referee subsequently, on his own motion, eliminated the above sentence from his findings, and it is not now in the record. We believe however, the motive it discloses is pertinent.

ATTORNEYS' FEES.

Specifications of Error XIV.

(G) The contract involved in this appeal provides in the 4th paragraph thereof [Tr. 98] as follows:

> "If action be instituted on this contract, buyer to pay such sum as the Court may fix as attorneys' fees, whether such action progresses to judgment or not."

In instituting this action, we believe that the Trustee is bound by the provisions of the contract made for the benefit of the vendor and that the appellant, under the above quoted provision of the contract, is entitled to recover from the Trustee reasonable attorneys' fees which she had to expend in the defense of the action of the Trustee before the Referee in Bankruptcy and the District Judge, and for prosecution of the appeal to this Court. We respectfully suggest to the Court that the sum of Two Thousand Five Hundred ($2,500.00) Dollars is a reasonable fee for the services performed by the attorneys for appellant.

Conclusion.

It is submitted that the order of the District Judge upholding the Order and Findings of Fact and Conclusions of Law of the Referee should be reversed on the ground that bankrupt vendee did not pay to the appellant the amount of her demand of February 5, 1946, and that no proper offer of payment or tender of the amount of appellant's demand was made to her by vendee Hill or anyone on behalf and with the assent of said Hill. That because said vendee Hill had no legal or equitable title to the property or legal possession thereof, at the time the petition in bankruptcy was filed, the Bankruptcy Court

had no jurisdiction to try or hear the proceedings, and that the petition of the Trustee for an Order to Show Cause *re* Jennie Wuchner should be dismissed and the real estate involved herein should be ordered stricken from the schedule of assets of said bankrupt Hill, and that appellant be awarded her costs of suit and attorney fees incurred in the lower court and her costs and attorney fees incurred in this appeal.

Respectfully submitted,

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